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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1539

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES JIM, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPELLEES' MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1509

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES JIM, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO AFFIRM DECREE AND BRIEF IN SUPPORT THEREOF

Pursuant to Rule 16 of the Rules of this Court, Appellees move to affirm the decree of the District Court upon the ground that it is manifest that the questions on which the decision of this case depend are so unsubstantial as to need no further argument and have previously been decided by this Court adversely to the contentions of Appellants.

INTRODUCTION

Appellant United States has fairly and accurately set forth in its jurisdictional statement the Opinion Below, Jurisdiction, Statutes Involved and Question Presented.

The additional Questions Presented by Appellant State of Utah are specious. It matters not that the United States and the Navajo Tribe have not consented to be sued. The relief sough by Appellees in this action required no action and imposed no restraint upon either the United States or the Navajo Tribe; they had no proprietary interest in the 37½% royalty fund which is the subject matter of this action. In addition, the United States has intervened herein pursuant to 28 U.S.C. § 2403. In its intervention the United States did not assert any interest in the royalties or the Aneth Extension lands.

The State of Utah can have no immunity from this action because this action has no impact on the governmental actions of the State of Utah—the royalty funds are not State revenues and are not disbursed to fulfill State governmental obligations. In addition, the State of Utah has by the enactment of Section 6, Chapter 139, Laws of Utah 1965, waived its immunity from suit:

> Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

This action meets the class action requirements of Fed. R. Civ. P. 23(a) and 23(b)(2). Appellees have maintained this action as representatives of the Indians

who reside on the Aneth Extension and it is that class as a class (and not as individual members thereof) which has the statutory and adjudicated right to receive the benefits from the royalties which are the subject matter of this action.

STATEMENT OF THE CASE

Appellees are representatives of a class of Indians with membership of approximately 1,500 people. They are mostly Navajos with a small mixture of Piute blood, *Sakezzie v. Utah Indian Affairs Commission*, 198 F. Supp. 218 at page 220 (Utah 1961) (hereinafter referred to as the "first *Sakezzie* case"). Appellees and the class represented by them and their ancestors have lived for generations in the areas commonly known as Ol Jato, Montezuma Creek and Navajo Mountain which were separate and apart from the Navajo Indian Reservation until annexation by statute in 1933 as the Aneth Extension, 47 Stat. 1418 (hereinafter referred to as the "1933 Act"). (See also Findings of Fact No. 11 and 12 of the court below in Appendix B pp. 19-21, Jurisdictional Statement of the United States.)

These Indians have continued to live in their primitive hogans, graze their small flocks of sheep and goats and farm their semi-arid lands in this remote and relatively naccessible area, respecting each other's area and the rea of the advancing white man (Finding of Fact No. 2). Their language and culture have, for the most part, emained primitive Navajo.

The 1933 Act itself shows the manifest intention of ie drafters of the legislation. It provides:

> [The lands of the Aneth Extension] are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary may see fit to settle thereon.

To make certain that the area inhabited by these Indians was permanently confined, the Act further provided:

> No further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said County.

After thus treating the matter with words indicating clear finality, the Act dealt with the question of oil and gas, which had not been discovered at that time. It provided:

> Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ percentum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah. Provided, that said . . . royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described . . . .or for the benefit of the Indians residing therein.

The white man was content to let these Indians live in this desolate semi-arid area where no one else wanted

to live. No problem arose with respect to the 1933 Act until years later when oil and gas were discovered in commercial quantities on the Aneth Extension (Finding of Fact No. 13).

The State of Utah thereupon undertook its duty to handle the trust funds thus accruing by creating the Utah Indian Affairs Commission and charging it with the administration and disbursement of these funds. Later, by further enactment, the Utah legislature abolished that Commission and created a successor Board, identified as the Utah Board of Indian Affairs, which, at all times material to this action, was charged with the responsibilities created by the 1933 Act (Finding of Fact No. 14).

As these funds accumulated into a sizeable amount (the accumulated and unused portion of the 37½% royalty fund as of June 30, 1970 was $7,039,022.32), questions arose as to how it should be spent. These Indians who were "benefited" by the 1933 Act, found themselves provided with a new paved road and, among other "benefits", a new airport. They wanted neither; however, both did provide excellent access for the white man—oil men, tourists and pilots, *Sakezzie, supra.*

In 1961, these Indians filed an action in the United States District Court for Utah, Central Division, to prevent the State of Utah as trustee from making further expenditures of funds from the trust unless such expenditures were for the benefit of the class of Indians residing on the Aneth Extension, *Sakezzie, supra.*

In his first opinion in that case, Judge Christensen, after noting the expenditures which had been made and which were about to be made, said:

That the duty of the defendants both under Federal and State law, between which there is no conflict in this respect, is to receive, administer and expend the said 37½ per cent fund for the benefit of the Navajo Indians residing on said Aneth Extension and such other Indians resident thereon at the time as the Secretary of the Interior has seen fit to settle thereon, all of whom are equitable beneficiaries of said fund. That said fund is not a public fund, and that it may not be used for State, Federal or public purposes or to discharge general governmental duties to the plaintiffs and those represented by them, who are citizens of the State of Utah and the United States of America and entitled to the rights and privileges of such citizenship. 198 F. Supp. 218, 224.

And again:

. . . . It is necessary to bear in mind that the tribe as a whole is not the designated beneficiary of this fund and that its interests and views may in some respects be in conflict with the more pertinent interests and views of the beneficiaries. The Tribe also has responsibilities to its members, including the beneficiaries of said fund, but said fund is not intended, and may not be used, for general tribal purposes. That the proper administration of said fund requires an effective canvas, expression and consideration, of the views of the beneficiaries. 198 F. Supp. 218, 225.

The judgment had little effect. The Commission failed to adequately comply with the decision and the field representative of the Commission to the Aneth Extension stated that he "didn't pay any attention to a small court", *Sakezzie v. Utah State Indian Affairs Commission,* 215 F. Supp. 12 at pp. 13 and 23 (Utah 1963) (hereinafter referred to as the "second *Sakezzie* case"). It was, therefore, necessary for the Indians to return to court to seek supplemental relief. Judge Christensen again held in favor of the Indians. In the second *Sakezzie* case he stated:

> The evidence now shows without dispute that the Commission from shortly after the entry of the declaratory judgment actively has sponsored legislation to extend the benefits of the fund to other Indians, and that pending final action on this legislation it has assumed to suspend any judgment or activity with regard to an affirmative program for the benefit of the Indians and declined to consider expenditures that might otherwise appear to them for the benefit of the Indians. The court concludes that the defendants are failing in accordance with the judgment to consider in good faith expenditures for the benefit of the Indians residing in the Extension. 215 F. Supp. 12, 20.
>
> . . . . However, I do not believe that the defendants as trustees or as administrators of that fund have the right, contrary to the declaratory judgment, to suspend or abandon their duties pending the possibility of enacting legislation which might reduce the interest of the plaintiffs

as beneficiaries of the fund even apart from constitutional questions that might be involved. 215 F. Supp. 12, 21.

No appeal was taken from either of the two *Sakezzie* decisions and they have long since become the law of the case.

Despite its duty as trustee to the Indians the State of Utah chose to disregard the decisions of the court and succeeded in obtaining an amendment to the 1933 Act by the enactment of Public Law 90-306 (82 Stat. 121) (hereinafter referred to as the "1968 Amendment"). (See the second *Sakezzie* case at p. 21, footnote 14 and p. 23 and minutes of the Board of Indian Affairs for June 28, 1965 and February 16, 1968).

The 1968 Amendment enlarged the class of beneficiaries from the approximately 1,500 Indians residing on the Aneth Extension to include within the class of beneficiaries all of the Navajo Indians residing in San Juan County, Utah, numbering approximately 15,000. It eliminated Indians other than Navajos who were residing on the Aneth Extension (e.g., Piutes) from any benefits. Appellants concede that the 1968 Amendment deprives the Appellees of substantially all of the 37½% royalty without compensation.

The instant action was commenced by the same class of Indians who were plaintiffs in the two *Sakezzie* cases to test the constitutionality of the 1968 Amendment. The Honorable Willis W. Ritter heard evidence in the case, part of which was taken at the Ol Jato Chapter House on the Ol Jato area of the Aneth Extension so that mem-

bers of this class of Indians, some of whom were old and unable to travel to Salt Lake City, could testify. On February 17, 1972, Judge Ritter signed Findings of Fact and Conclusions of Law and an Interlocutory Decree and Order in which he held that the 1968 Amendment to the 1933 Act which enlarged the class from the 1,500 Indians residing on the Aneth Extension to the 15,000 Navajo Indians residing in San Juan County, Utah "deprives the plaintiffs of their title and ownership of said 37½% royalties, in violation of Amendment V to the Constitution of the United States and is unconstitutional and invalid insofar as it dilutes the plaintiffs' title and ownership and changes the purposes for which such royalty funds may be expended." (See Interlocutory Decree and Order No. 3 in Appendix A pp. 15-16, Jurisdictional Statement of the United States.)

ARGUMENT

I. THE 37½% ROYALTY FUND IS VESTED IN APPELLEES.

Underlying the only real issue in this action is the proposition, urged by the United States and the State of Utah (in its capacity as trustee for Appellees), that Indians in the United States are not entitled to fifth amendment protection from governmental action. The answer to that proposition, on which the decision in this action depends, should be so manifest to the court that it is unsubstantial and does not need further argument.

Appellees' position is that the class of Indians residing on the Aneth Extension is the vested beneficial owner of 37½% of the royalties derived from the oil and

gas leases on the Aneth Extension. The title to and ownership of such royalties is a community title and is not vested in Indians as individuals.

The vesting of such beneficial ownership has been confirmed by aboriginal possession, congressional statute and judicial decision. The aboriginal title of Appellees and the class represented by them resulting from the historical occupancy of the Aneth Extension by them and their ancestors has been repeatedly recognized by this Court as a title "considered as sacred as the fee simple title of the whites," *Mitchel v. United States,* 9 Pet. 746.

The 1933 Act irrevocably vested the right to beneficial ownership in the 37½% royalty fund in the class of Indians residing on the Aneth Extension by defining the Aneth Extension and prohibiting further forms of entry or disposal of it. The Act also prohibited Indians from receiving further allotments or homesteading in San Juan County, Utah. The *Sakezzie* decisions confirmed that the 37½% royalty funds was a trust fund of which Appellees and the class represented by them were the equitable beneficiaries and that the fund must be expended for the exclusive benefit of the Indians residing on the Extension and that it could not be used to discharge governmental or tribal obligations to the beneficiaries.

II. APPELLEES CANNOT BE DEPRIVED OF THEIR PROPERTY WITHOUT JUST COMPENSATION.

This Court has held that even Indians cannot be deprived of their property without just compensation.

United States v. Creek Nation, 295 U.S. 103. This was an action in the Court of Claims by the Creek Tribe against the United States to recover compensation for a tract of land of approximately 5,575 acres in Oklahoma. By an act of Congress, jurisdiction was conferred upon the Court of Claims to hear, examine, adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek tribe. Under the treaty of 1833, the United States granted a patent to the tract to the Creek tribe in exchange for other lands.

In 1874, the United States entered into a treaty with the Sac and Fox tribe by which it assigned to this tribe a tract adjoining the Creek tract. Due to errors in the government's survey, the conveyance of the Sac and Fox tract included the Creek tract. By agreement between the Sac and Fox tribe and the United States, which was ratified by an act of Congress, the 5,575 acre tract belonging to the Creeks was in part allotted to Sac and Fox Indians and part was sold to settlers. The proceeds of sale were deposited as public funds in the treasury of the United States. The government contended that the action was a simple action for damages caused by errors of administrative officers and that the Court of Claims, therefore, had no jurisdiction. This contention required the Court to determine whether the act of Congress allotting the Creek lands to the Sac and Fox Indians and selling other parts of the tract to settlers was within the power of Congress. This Court held that it was not.

> . . . The tribe was a dependent Indian community under the guardianship of the United

> States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation." *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110, 113, 39 S.Ct. 185, 186, 63 L.Ed. 504, 506; *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 307, 308, 23 S.Ct. 115, 47 L.Ed. 183 (295 U.S. 103, 109-110).

The pertinent constitutional restrictions referred to in the quotation above are unmistakably contained in the fifth amendment.

Lane v. Pueblo of Santa Rosa cited in the *Creek Nation* case also denied the power of the United States to control Indian lands for purposes other than protecting the property from dissipation or loss. The plaintiff in the action was a town or pueblo inhabited by a group of Indians. It was the ancestral home of the Indians who had occupied it for farming and stock raising for several generations. Plaintiff claimed title to the land under a Spanish grant and also by occupancy which had never been disturbed. The Secretary of the Interior, acting under

the acts of Congress authorizing the sale of public lands, advertised the property for sale and was proceeding to sell it at public auction. The Court held that the Indian title was valid and that the act of the United States in selling the land as part of the public domain would be an act of confiscation.

> The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States — recognized as such by the legislative and executive departments — and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering. Certainly, it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. 249 U.S. 110, 113.

In *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, the Shoshone Tribe of Indians under a treaty ratified by an act of Congress relinquished their claim to over forty-four million acres of land in four western states and accepted in exchange a reservation of three million acres in Wyoming known as the Wind River Reservation. The United States agreed that the Wind River Reserva-

tion would be set apart for the absolute use and occupation of the Shoshone Indians and such other friendly tribes as the Shoshones would consent to. Without obtaining this consent, a band of Arapahoes was installed on the reservation under military escort. By act of Congress an agreement was approved whereby part of the reservation was ceded to the United States for a money consideration which was to be distributed among the Shoshone and the Arapahoes equally. The Shoshones claimed all of the proceeds of the cession, but the government refused to recognize it. It made subsequent arrangements whereby it recognized and protected the claimed right of the Arapahoes. The Shoshones claimed that the government had by statute appropriated a one-half interest in the reservation and awarded it to the Arapahoes in violation of the fifth amendment. This Court affirmed that claim. Speaking of the power of the government to manage and control the property of Indians, the Court said that:

> The power does not extend so far as to enable the Government "to give the tribal lands to others or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . for that would not be an exercise of guardianship but an act of confiscation." 249 U.S. 476, 497.

III. THE LOWER COURT WAS NOT BIASED OR PREJUDICED.

As to the charge by the State of Utah that the court below was manifestly biased and prejudiced in favor of Appellees, we urge the Court to read fully the record and

transcript below and, in particular, to examine the two *Sakezzie* decisions. By acting as statutory trustee for the class of Indians residing on the Aneth Extension while at the same time taking affirmative action to deprive the class of the trust funds, the State of Utah has breached its fiduciary duty and the court below, or any court, is justified in being critical. As Judge Christensen stated in the second *Sakezzie* case:

> If there were ever a humanitarian dream come true, if there were ever an opportunity for proof in this country that when Indians have been treated shabbily by government it is because of practical limitations rather than mere niggardliness, the situation of [the State of Utah] would seem to present them. Yet by rather clear proof . . . it is shown that . . . [it] has . . . [had] insufficient regard for the interests of the plaintiffs and those whom they represent as Distinguished from others. Among other things, it has declined to exercise its judgment under the laws governing its functions; it has suspended the consideration of projects which could be most beneficial to those designated by the present federal and state laws, pending an effort on its part to effect a dilution of plaintiffs' rights. The [State of Utah] has permitted itself to be influenced in this respect by interests out of harmony with its own duty. . . 215 F. Supp. 12, 22-23.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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